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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 568

UNITED STATES OF AMERICA, PETITIONER

v.

SANDY PRAYLOU, IN HIS OWN RIGHT, AND MARION MOISE, AS GUARDIAN AD LITEM FOR SARAH LOUISE PRAYLOU, MAGGIE PRAYLOU AND EDDIE PRAYLOU; AND EDWARD WALKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on November 9, 1953.

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Eastern District of South Carolina, Columbia Division (R. 4-6, 17-19) are not reported. The opinion of the Court of Appeals (R. 21-26) is reported at 208 F. 2d 291.

JURISDICTION

The judgments of the Court of Appeals were entered in both cases on November 9, 1953 (R. 26-27). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a state statute providing for absolute liability without fault constitutes an adequate basis, under the Federal Tort Claims Act, for the recovery of damages resulting from a military plane crash.

STATUTES INVOLVED

1. The Federal Tort Claims Act, as codified in 28 U.S.C. 1346(b), 2674, and 2680(a), provides in pertinent part:

> 1346(b). Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2674. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2680(a). The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

2. Section 2-6, South Carolina Code (1952), imposing absolute liability on the owner of aircraft, provides:

> The owner of every aircraft which is operated over the land or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath caused by ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured or of the owner or bailee of the property injured. * * *.

STATEMENT

These two cases, the *Praylou* case and the *Walker* case, were brought under the Federal Tort

Claims Act and arise out of two separate Air Force plane crashes:

1. *Praylou case.* Shortly after noon on August 16, 1951, a B-26 Air Force plane crashed upon Praylou's land in South Carolina, destroying his barn and two smaller structures (R. 5). Burning fuel from the crashing plane also caused personal injuries to his three children, who were then near the barn (R. 5).

This action was instituted in the United States District Court for the Eastern District of South Carolina, Columbia Division, by the filing of a Federal Tort Claims Act complaint which asserted that "liability for said damages as hereinabove set forth is imposed on the defendant, the United States of America, as owner of the said airplane under the provisions of Section 7104 of Code of Laws of South Carolina, 1942" (R. 2).[1] The United States admitted that the plane crashed on Praylou's land and stipulated that the plane was owned by the United States and operated by an Air Force pilot acting within the scope of his employment at the time of the accident (R. 3-4). The Government's answer, however, denied that it could be held liable under Section 7104, South Carolina's absolute liability statute, for the resulting damages (R. 3).

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[1] Section 7104 of the South Carolina Code imposes absolute liability upon the owner of aircraft for injuries caused by the plane to persons or property on the land, irrespective of negligence on the part of the owner or of the pilot. Section 7104 was recodified, without any change of language here material, in the 1952 South Carolina Code as Section 2-6, *supra*, p. 3.

At the trial, the only evidence offered concerned the occurrence of the crash and the extent of the children's personal injuries and Praylou's property damage.

2. *Walker case.* On October 18, 1951, a different Air Force plane crashed and struck the ground in Sumter County, South Carolina, within a few feet of a house outside of which Walker was working (R. 17-18). To avoid being struck by the crashing plane, he ran from his work and collided with an iron truck body in his path (R. 18).

As in the *Praylou* case, the *Walker* action was instituted in the United States District Court for the Eastern District of South Carolina, Columbia Division, by the filing of a complaint against the United States under the Federal Tort Claims Act (R. 15). The answer of the United States, as in the other case, admitted the crash of the Air Force plane piloted by an Air Force officer acting within the scope of his employment, but denied liability (R. 16-17).

At the trial, Walker's only evidence concerned the occurrence of the crash and the extent of his personal injury. Before resting, his counsel called the district court's "attention to the South Carolina Code of Laws, Section 7104. (1952 Code, Volume 1, Section 2-6)" and read to the court the full text of this statute (R. 17), see *supra,* p. 3. After reading this statute to the court, counsel pointed out that "under the pleadings, it is admitted that this was an official flight, and in the scope of his employment. That is under paragraph 6 of the answer.

That is admitted. We have nothing further to offer" (R. 17).

After the trial of both the *Praylou* and *Walker* cases, the district court made findings limited to the occurrence of the crash and the extent of the respective plaintiffs' injuries and damages (R. 4-6, 17-18). No findings of any negligence on the part of any federal employee were made in either case. Instead, the district court, relying in both cases on Section 2-6 of the South Carolina statute which makes "the owner of every aircraft * * * absolutely liable for injuries [caused by the plane] to persons or property on the land * * *, whether such owner was negligent or not," awarded judgment for a total amount of $28,413.83 in the Praylou case and $1,500 to Walker (R. 7-9, 19). The Court of Appeals for the Fourth Circuit affirmed the judgments in both cases, stating "that the federal tort claims act was intended to cover cases involving liability [without fault]" (R. 24).

Reasons for Granting the Writ

The Court of Appeals' holding that the principle of strict liability without fault may be invoked as a basis for recovering damages from the United States under the Federal Tort Claims Act calls for review and reversal by this Court. This holding on an issue of far reaching importance in the administration of the Act is in square conflict with *Dalehite* v. *United States*, 346 U. S. 15, flying in the face of this Court's express ruling that the Act does not extend to situations of liability without fault. In

addition, the ruling below conflicts with the decisions of all of the other four courts of appeals which have dealt with this issue, both before and after this Court's opinion in *Dalehite*.

1. 28 U. S. C. 1346(b) conditions governmental liability under the Federal Tort Claims Act on the "negligent or wrongful act" of a government employee. *Supra*, p. 2. In *Dalehite* v. *United States*, 346 U. S. 15, this Court, adhering to that language of the Act, directly rejected the contention that the doctrine of absolute liability without fault may be invoked as a basis for recovering damages under the Federal Tort Claims Act (346 U. S. 15, 44-45):

> * * * *there is yet to be disposed of some slight residue of theory of absolute liability without fault.* This is reflected both in the District Court's finding that the FGAN constituted a nuisance, and in the contention of petitioners here. *We agree with the six judges of the Court of Appeals, 197 F. 2d 771, 776, 781, 786, that the Act does not extend to such situations, though of course well known in tort law generally.* It is to be invoked only on a "negligent or wrongful act or omission" of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. *So it*

is our judgment that liability does not arise by virtue either of United States ownership of an "inherently dangerous commodity" or property, or of engaging in an "extra-hazardous" activity. United States v. *Hull,* 195 F. 2d 64, 67. [Emphasis added.]

While the dissenting opinion in *Dalehite* (346 U. S. 47-60) expresses disagreement with all other aspects of the *Dalehite* decision, it is significant that the dissent found no fault with the majority's ruling that the theory of absolute liability cannot be used as a basis for a Tort Claims Act recovery.[2]

[2] We believe that the *Dalehite decision* is completely dispositive of the issue presented by this petition. It is nevertheless appropriate to note that legislative reports concerning 28 U. S. C. 2680(a), part of the original Federal Tort Claims Act, fully support the holding that strict liability without fault was not to be imposed on the United States. Section 2680(a) excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee." *Supra,* p. 3. In the 77th Congress, the Senate proposed the express exemption of nuisances not involving negligence. The House Committee rejected the proposed specific exception because the general exclusionary language of Section 2680(a) would automatically exclude non-negligent authorized acts "which might constitute a nuisance if done by a private person" (H. Rept. No. 2245, 77th Cong., 2d Sess., p. 12). And the 79th Congress emphasized that Section 2680(a) was adopted so as to "preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity * * * *where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious* * * *." H. Rept. No. 1287, 79th Cong., 1st Sess., p. 5. (emphasis added) The assumption by the court below that strict liability without fault could be imposed on the United States under the South Carolina code, even though no government employee was negligent, solely because an airplane crash would subject a private airplane owner to liability, pays no heed to this clear congressional declaration.

Earlier, as shown by the *Dalehite* reference to the *Hull* case, the Court of Appeals for the First Circuit had reached the same conclusion. There, Judge Magruder, writing for a unanimous court, stressed the fact that "the waiver of sovereign immunity under the Federal Tort Claims Act is not unlimited," and that while "under local law a private person may be liable without fault * * * the United States would not be subject to suit on such a liability." *United States* v. *Hull,* 195 F. 2d 64, 67. The full bench of the Fifth Circuit, as this Court has noted, *supra,* p. 7, had made the same ruling in its decision in the Texas City litigation, 197 F. 2d at 776, 781, 786. Since the *Dalehite* decision, this Court's holding that the Federal Tort Claims Act does not extend to liability without fault has been accepted and applied by the Third, Fifth, and Tenth Circuit Courts of Appeals. *Heale* v. *United States,* 207 F. 2d 414 (C. A. 3); *United States* v. *Inmon,* 205 F. 2d 681, 684 (C. A. 5); *Harris* v. *United States,* 205 F. 2d 765, 767 (C. A. 10). The instant decision is in conflict with all of these court of appeals cases, as well as with *Dalehite.*[3]

The opinion below not only fails to follow *Dalehite,* but is based on reasoning directly repudiated by this Court in that case. In holding that damages are recoverable under the Federal Tort Claims Act on the basis of the principle of absolute liability which is incorporated in South Carolina's statute

[3] Instead of following *Dahehite,* the Fourth Circuit seems to be adhering to its earlier view (*D'Anna* v. *United States,* 191 F. 2d 335, 337) that operators of airplanes are absolutely liable for crashes (See R. 23).

with respect to airplane crashes, the Fourth Circuit reasons that an airplane crash in South Carolina constitutes a "wrongful" act and therefore falls within the language of the Tort Act predicating liability on the "negligent or *wrongful*" act of a government employee (emphasis added).[4] But this identical reasoning was advanced and specifically rejected in the *Dalehite* opinion (346 U. S. 15, 45):

> Petitioners rely on the word "wrongful" though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or non-feasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory.[5]

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[4] The district court's conclusions of law, handed down before the *Dalehite* opinion, were apparently based on the same assumption that the word "wrongful" was broad enough to include claims based on the absolute liability theory. Thus, the court's conclusion quoting from Section 1346(b) of the Federal Tort Claims Act, *supra*, p. 2, stated that the damages to respondents were "caused by the negligent, *or wrongful* act or omission of an employee of the Government while acting within the scope of his office or employment" (R. 6, 18) (emphasis added). It should be noted that the district court's use of the word "negligent" in this conclusion of law resulted simply from its paraphrasing of the statutory language. There is absolutely no evidence of any negligence whatsoever in the record, and neither of the courts below made any factual finding of negligence on the part of any government employee. See *infra*, note 7, page 12.

[5] The *Dalehite* opinion further points out that "rather" than incorporating the absolute liability theory as a basis for recovery of damages under the Tort Claims Act, the word

No more convincing is the other argument in the opinion below that "it would be absolutely absurd to hold that the government is liable under the Tort Claims Act for the act of an employee who crashes into a house with a truck but not liable if he crashes into it with an airplane, and this on the theory that there is absolute liability under state law in the latter case but not in the former" (R. 26). This wholly misconceives the Government's position. That the Government may be held liable under the Tort Claims Act for the negligent act of an employee where there is a crash into a house either with a truck or with an airplane is, of course, freely conceded. However, where employees—whether the case be that of a truck or of a plane—are not at fault, it is our position that the United States cannot be held liable for the non-intentional and non-negli-

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"wrongful," as used in the Act, had a "much narrower inspiration: 'trespasses' which might not be considered strictly negligent. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess., 43-44." 346 U. S. 15, 45. Thus, as pointed out at page 241, note 82, in the Government's brief filed here in the *Dalehite* case, "a small class of individual torts, like *deliberate* trespass to property, which are non-negligent" (emphasis added) would be covered by the Act. The damage to property in the instant cases was not only non-negligent but not deliberate and would not therefore be actionable as a trespass. This fully accords with the general contemporary rule that, apart from the absolute liability attaching to the conduct of an extrahazardous activity, there is no liability for an unintentional and non-negligent invasion of property, even where harm results. *Edgarton* v. *H. P. Welch Co.*, 321 Mass. 603, 612, where the court stated: "The trend of modern authority is that an unintended intrusion upon the land in possession of another does not constitute a trespass." Accord: *Feiges* v. *Racine Dry Goods Co.*, 231 Wis. 270, 275 (holding that "Where there is no intentional, no voluntary act, there is no tort, no trespass"); *Durst* v. *Wareham*, 132 Kan. 785, 789;

gent act of crashing.[6] In other words, imposition of liability on the United States in the truck situation is based simply on negligence in the driving or maintenance of the truck. Similarly, it is only because of a failure to show such negligence that the Government cannot be held liable for a non-negligent or unintentional airplane crash. If respondent had shown and the court had found negligence, these cases would have been entirely different and recovery would have been proper; the South Carolina absolute liability statute would not preclude recovery for negligence under the common law. See e.g. *Parcell* v. *United States,* 104 F. Supp. 110 (S. D. W. Va.).[7]

Puchlopek v. *Company,* 82 N. H. 440, 442; *Gayler & Pope, Ltd.* v. *B. Davies & Son, Ltd.* [1924] 2 K. B. 75, 76-81. This accepted rule is also embodied in the *Restatement of Torts,* which declares (Section 166): "Except where the actor is engaged in an extra-hazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest." In *United States* v. *Gaidys,* 194 F. 2d 762 (C. A. 10), the court characterized an airplane crash as in the nature of a "trespass", but only because the government plane was negligent in flying at an unsafe altitude immediately before the crash.

[6] There appear to be federal statutes, however, authorizing administrative payment, to a limited extent, for "damages to persons and private property resulting from the operation of aircraft." Act of June 30, 1922, 42 Stat. 737. The administrative settlement provisions of this 1922 statute were later incorporated into the Military Claims Act of 1943 (57 Stat. 372; 31 U. S. C. 223b), and now authorize limited payment of claims based on the liability without fault principle.

[7] In addition to the fact that the record discloses no negligence and that neither the district court nor the court of appeals even suggested that there was any negligence on the

2. The question presented here recurs constantly in the heavy volume of litigation against the United States under the Federal Tort Claims Act. The clear conflict between the decision below, on one hand, and this Court's *Dalehite* decision and those of the First, Third, Fifth, and Tenth Circuits, on the other hand, will doubtless result in uncertainty and difference in treatment of similar cases by the district courts. Only by review and reversal of the decision below on the authority of *Dalehite* will that doubt and lack of uniformity be eliminated.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

FEBRUARY, 1954.

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part of any government employee (*supra*, note 4, page 10), it is important to note that the general inference of negligence arising from the *res ipsa loquitur* rule clearly had no application in the instant cases because that "rule * * * does not obtain" in South Carolina. *Daniels* v. *Timmons*, 216 S. Car. 539, 59 S. E. 2d 149, certiorari denied, 340 U. S. 841; *Eickhoff* v. *Beard-Laney, Inc., et al.*, 199 S. Car. 500, 20 S. E. 2d 153. Even in those states where the *res ipsa loquitur* rule *does* obtain, many of the courts which have considered the problem have held *res ipsa loquitur* inapplicable in suits for damages resulting from airplane crashes. See *Prosser on Torts* (1941 ed.), p. 296.

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In The
Supreme Court Of The United States

October Term, 1953

No. 568

UNITED STATES OF AMERICA,
Petitioner

v.

SANDY PRAYLOU, IN HIS OWN RIGHT AND MARION MOISE, AS GUARDIAN AD LITEM FOR SARAH LOUISE PRAYLOU, MAGGIE PRAYLOU AND EDDIE PRAYLOU; AND EDWARD WALKER.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The Respondents above named submit the following Brief in opposition to the granting of a writ of certiorari in the above styled case.

STATEMENT OF FACTS

In Petitioner's Brief, it is stated:

"That the Government may be held liable under The Tort Claims Act for the negligent act of an employee where there is a crash into a house either with a truck or with an airplane is, of course, freely conceded." (Page 11) * * * "If Respondent had shown and the Court had found negligence, these cases would have been entirely different and recovery would have been proper; the South Carolina absolute liability statute would not preclude recovery for negligence under the common law." (Page 12).

Negligence was an issue in both the *Praylou* and *Walker* cases. Both Complaints alleged that the two separate airplanes were being negligently operated. (R. pp. 2 and 15). This was denied by the Government, (R. 3 and 16), but it offered no evidence to rebut the presumption of negligence established by the falling of the different planes. It was admitted in both cases that the respective airplanes were being operated by employees of the Government on Government business.

In the *Praylou* case, in addition to oral testimony, the Investigation Report made by a Military Board of Inquiry was offered in evidence by Respondent. (Exhibit 7). This showed that the plane took off from Shaw Air Force Base, and after proceeding about 3 miles, attempted to return to its base. Suddenly, after making an unusual noise, the plane plummetted to the ground and exploded. The plane was completely demolished and its occupants instantly killed. This was substantiated by the testimony of David Jenkins, the only witness offered by the Government. (R. 13-14).

In the *Walker* case, Respondent was laying tile on the porch of a house over which planes were constantly flying. He heard an unusual motor sound, looked up and saw a plane flying very low, with engines smoking. The plane was flying in an erratic manner, caught on fire, started diving to

the ground, and exploded, almost striking Respondent. While trying to escape from the burning fragments of the plane, Respondent fell, striking his back on a steel truck body used as a mortar container, thereby injuring his back. Respondent was endeavoring to extricate himself from a sudden perilous situation.

In both cases, the District Judge found that Respondents' damages were caused by the negligent, or wrongful act or omission of a government employee while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable in accordance with the law of South Carolina where the act or omission occurred. The District Judge also found that Respondents were not guilty of any negligence or contributory negligence. (R. pp. 6 and 18). The Court of Appeals affirmed, (R. 21-26), and the opinion is reported in 208 F. 2nd. 291.

REASONS FOR DENYING THE WRIT

1. *Liability is to be determined by the law of South Carolina:*

The Federal Tort Claims Act (USC 1346(b) and 2674) specifically provides that tort claims against the United States shall be determined under the same circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred; and in the same manner and to the same extent as a private individual under like circumstances.

The Federal Courts have consistently held in several recent cases that suits for damages arising out of airplane accidents must be determined in accordance with the law of the State where the accident occurred. And in each of

the following airplane cases the United States was held liable.

In *United States* vs. *Gaidys,* (C. A. 10) 194 F. 2nd. 762, plaintiff and wife recovered for property damage and personal injuries caused when a jet plane crashed into their residence located a short distance from Lowry Air Force Base, Colorado.

In *Eastern Air Lines, Inc.,* v. *United States,* (D. C., Del.) 110 F. Supp. 491, plaintiff recovered for damages to an airliner sustained in a collision with an army bomber which occurred in South Carolina.

In *D'Anna* v. *United States,* (C. A. 4) 181 F. 2nd. 335, plaintiff recovered damages when an auxiliary gas tank fell from a naval plane flying over Baltimore, Maryland.

In *Parcell* vs. *United States,* (D. C. W. Va.) 104 F. Supp. 110, plaintiff recovered judgment against the United States when two jet planes flying in formation crashed on his land.

In *Union Trust Co. of Dist. of Cola.* v. *United States,* (D. C. D. C.) 113 F. Supp. 80, plaintiff recovered judgment against the United States for wrongful death of airplane passengers in collision with a military plane while the passenger airliner was attempting to land at Washington National Airport. In this case, it is stated:

> "*** The present climate of public opinion, of which The Federal Tort Claims Act is the most conspicuous example, is to the effect that the fiction of sovereign immunity is for the most part outmoded and as far as it relates to the Act in question, preserved *only in those specific exceptions which Congress has specifically indicated and of which the activity with which we are here concerned is not one.* See generally, *Federal*

Crop Ins. Co. v. *Merrill*, 1947, 332 U.S. 380, 383, 68 S. Ct. 1, 92 L. Ed. 10." (Emphasis added).

2. *South Carolina Airplane Liability Statute Controls*:

The Uniform State Law for Aeronautics was adopted in South Carolina in 1929 (36 Statutes of S. C., 220-222) and is now incorporated in 1952 S. C. Code, Title 2, Secs. 1-12. This Uniform Law has been likewise adopted in whole or in part by a majority of the States. While the validity of this statute has not been questioned, yet the New Jersey statute which is identical with the South Carolina statute has been held constitutional in *Prentiss* v. *National Airlines, Inc.*, 112 F. Supp. 306. In the *Prentiss* case, *Supra*, the opinion states:

> "Furthermore, that absolute liability is recognized today as due process of law, we have on the highest authority. In *Crowell* v. *Benson*, 1932, 285 U. S. 22, 82, 52 S. Ct. 285, 304, 76 L. Ed. 598, the highest court in the land said: 'The power, under proper circumstances, to provide for liability without fault, *** is beyond question.' Similarly, in *New York Central R. Co.* v. *White*, 1917, 243 U.S. 188, 204, 37 S. Ct. 247, 253, 61 L. Ed. 667, the same court said: 'liability without fault is not a novelty in the law. The common law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained.' "

Nor can its applicability to the facts of this case be doubted. The Federal Tort Claims Act is nothing more than a waiver of the Government's immunity. It does not attempt

to limit or define degrees of liability. That problem is left to the various states. As was so tersely stated by Mr. Justice Brandeis in *Erie RR. Co.* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487:

> "Except in matters governed by The Federal Constitution or by acts of Congress, *the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.*" (Emphasis added).

The Tort Claims Act is couched in quite broad and very sweeping language and must be given a liberal construction. See, *United States* v. *Aetna Casualty & Surety Co.,* 338 U.S. 366, 70 S. Ct. 207, 94 L. Ed. 171; *United States* v. *Yellow Cab Co.,* 340 U.S. 543, 71 S. Ct. 399, 95 L. Ed. 523.

In South Carolina, the ordinary rules of negligence which apply to the operation of airplanes are similar to those which relate to the operation of vehicles. An automobile driver or a pilot in an airplane must use that degree of care which an ordinarily careful person would use as the situation and circumstances demand. See, *Carroll* v. *Lumpkin,* 146 S. C. 178, 143 S.E. 648; *Crouch* v. *Cudd,* 158 S. C. 1, 155 S.E. 136; *Holcombe* v. *W. N. Watson Supply Co.,* 171 S. C. 110, 171 S.E. 604.

While the rule of evidence known as *res ipsa loquitur* is not in force in South Carolina, yet its rejection does not mean that negligence may not be established by circumstantial evidence. The South Carolina Supreme Court has so held in two recent cases: *Eickhoff* v. *Beard-Laney, Inc.,* (1942) 199 S. C. 500, 20 S.E. 2nd. 153, 141 A. L. R. 1010; and *Daniels* v. *Timmons,* (1950) 216 S. C. 539, 59 S.E. 2nd. 149, certiorari denied, 340 U.S. 841. The rule

enunciated in these cases is that "circumstantial evidence is regarded by law as competent to prove any given fact in issue in a civil case and is sometimes as cogent and irresistible as direct and positive testimony. In many instances facts can be proved only by circumstantial evidence." And "the facts and circumstances shown should be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates."

In the cases here, where each of the two different planes crashed to the ground and exploded and inflicted injuries and damages, the falling in each such case, coupled with the further facts that just before falling each made an unusual noise and an erratic flight, is the strongest sort of proof of either negligent operation or defective construction or equipment. In neither case did the Government offer any evidence whatever showing or even tending to show the skill and training of the pilots or the safe and proper construction and maintenance of the respective planes; nor did it attempt to rebut the presumption of negligence in either case. The South Carolina airplane liability statute is really nothing more nor less than the adoption of the doctrine of *res ipsa loquitur* as limited to airplane accidents, because it is generally impossible to establish with any certainty the cause of the falling of an airplane.

3. *Cases Distinguished*:

None of the cases relied on by Petitioner involve accidents caused by falling airplanes. The facts in these several cases clearly show that they have no application to the cases here in question. Each of them can be readily distinguished.

Dalehite v. *United States*, 346 U. S. 15, did not involve any statute of the State of Texas, where the act or omission occurred, defining the liability of a defendant, as is the case

here; and the decision is based upon a specific exception to The Federal Tort Claims Act, to-wit: Section 2680(a), which has no application to the case here. Respondents are not relying on any doctrine of nuisance in this case. Nor do they contend that liability on the part of the United States arises simply because of the ownership of military airplanes, nor because the Government operates Shaw Air Force Base in South Carolina. Respondents' contention is that the South Carolina statute imposes liability for damages caused by a falling airplane and also because the damages resulted from the negligent or wrongful act or omission of the respective pilots of the particular planes in question while acting within the scope of his employment.

In *United States* v. *Inmon,* (C. A. 5) 205 F. 2nd. 681, a boy was injured by the explosion of a blasting cap which he found on private property, which several years prior thereto had been leased for Army training purposes. There was no proof of any particular act or omission on the part of any employee of the Government which might constitute negligence, and the court found that the boy was guilty of contributory negligence barring any recovery.

In *Harris* v. *United States,* (C. A. 10) 205 F. 2nd. 765, the suit was for damages to appellant's cotton and peanut crops resulting from spraying operations conducted by the United States on its adjoining property. The opinion of the Court of Appeals, after reviewing the facts, said:

> "From these findings the Court concluded that the acts of the government complained of constituted the exercise of a discretionary function within the meaning of 28 U. S. C. A., Sec. 2680(a) of The Tort Claims Act, which, inter alia, excludes from the provisions of the Act any claims 'based upon the exercise or performance or the failure to exercise or perform

a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused'.

We can find no valid distinction between the decision to destroy the willows and eradicate the mosquitoes by the use of 2, 4-D sprayed from an airplane and the decision to manufacture, bag, label and ship fertilizer in the *Dalehite* v. *United States case,* 346 U.S. 15, 73 S. Ct. 956. Moreover, if the operational details can be said to be outside the area of discretionary functions, the trial court's finding of non-negligence forecloses liability for any negligent or wrongful act of a government employee."

In this connection, attention is again called to the decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Gaidys, Supra,* where the Government was held liable for damages caused by the falling of a military airplane in Colorado. The *Harris* case does not modify or overrule the doctrine laid down in the *Gaidys* case, and does not even refer to the *Gaidys* case. Hence, the same Court of Appeals has imposed liability under The Tort Claims Act for damages sustained because of the crashing of a military airplane on land of the claimant; but has denied liability where "a discretionary function or duty" was involved, because such acts are specifically exempted from the Act under the provisions of Sec. 2680(a). The distinction between the *Gaidys* case on the one hand and the *Harris* case on the other hand is crystal clear.

In the cases here before this Court, the District Judge found as a fact that each of the airplanes involved was owned by the United States Air Force and that the pilot was acting in his official capacity and within the scope of his office and employment at the time of the accident and that

the damages were caused by his negligent or wrongful act or omission, and that the plaintiffs (respondents) were not guilty of any negligence whatever. (R. pp. 6 and 18). In the *Praylou* case, see also the Stipulation (R. p. 4) and the finding of the Military Board of Inquiry (R. p. 13).

Surely, the authorized flights of two military planes piloted by officers acting within their official duties under military orders, which subsequently crashed and caused the damages complained of, were not such "a discretionary function or duty" so as to bring them within the specific exemption of The Tort Claims Act under the provisions of Section 2680(a). The decisions in both the *Dalehite* and *Harris* cases are based on the exception contained in Section 2680(a); hence those cases are not applicable nor controlling in the cases here in question.

The opinion in *Heale* v. *United States*, (C. A. 3) 207 F. 2nd. 414, is very brief and contains no facts. The judgment against the United States was vacated and the cause remanded "to the end that appropriate findings may be made." The force of this decision is lacking.

CONCLUSION

Under the authorities herein cited and for the reasons above set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SHEPARD K. NASH,
JOHN D. LEE,
M. M. WEINBERG, JR.
Sumter, S. C.
Counsel for Respondents

March 5, 1954.

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 568

UNITED STATES OF AMERICA, PETITIONER,

v.

SANDY PRAYLOU, IN HIS OWN RIGHT, AND MARION MOISE, AS GUARDIAN AD LITEM FOR SARAH LOUISE PRAYLOU, MAGGIE PRAYLOU AND EDDIE PRAYLOU; AND EDWARD WALKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN REPLY TO THE BRIEF IN OPPOSITION

This Reply Memorandum is directed solely to what we believe is a crucial misstatement in Respondents' Brief in Opposition. At page 2 of the Brief in Opposition, respondents state: "Negligence was an issue in both the *Praylou* and *Walker* cases."

This statement has no support in the record. To the contrary, the record establishes that both cases were based and tried on the assumption that no issue of negligence was involved. This was made perfectly clear to the trial court by counsel at the outset of the *Praylou* trial. Page 2 of the transcript of proceedings at that trial, a copy of which has been filed with this Court, shows the following colloquy:

> The COURT: Is there negligence involved in it?
>
> Mr. MILLER [counsel for United States]: There is not, as I understand.
>
> The COURT: You affirmatively plead?
>
> Mr. LEE [counsel for the Praylous]: No, sir.[1]

Similarly, in the *Walker* case there is not a single word in the entire record, printed or unprinted, which can support any finding of negligence. As pointed out at pages 5-6 of our Petition, Walker's counsel relied only on the crashing of the government plane while on an official flight and made no attempt to substantiate any claim of negligence.

That no issue of negligence was involved in either case is further confirmed by the fact that proof of negligence in the operation of a plane is absolutely immaterial under the South Carolina absolute liability statute. Since both cases were tried on the theory that the absolute liability statute could be

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[1] While this part of the transcript has not been printed, the "Stipulation as to Record" filed in this Court expressly authorizes the parties to refer to unprinted portions of the record filed in this Court (R. 28).

invoked to hold the United States liable,[2] the only proof necessary to support recovery of damages under that theory was (1) the occurrence of the crash and (2) the ownership of the plane by the United States. And the evidence in both cases shows that only these two factors were established. The district court's findings of fact similarly were limited to those two factors. (R. 4-6, 17-18.) Its findings of fact in no way indicate any negligence on the part of any government employee.[3]

CONCLUSION

For the reasons set forth above and in our Petition, it is respectfully submitted that the petition should be granted.

SIMON E. SOBELOFF,
Solicitor General.

MARCH 1954.

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[2] See Petition, pp. 4-5, showing that counsel in both cases specifically invited the trial court's attention to the provisions of the South Carolina absolute liability statute.

[3] The meaning and effect of the district court's conclusion of law (as distinguished from its findings of fact), to the effect that the damages were caused by a "negligent, or wrongful act", is discussed at footnote 4, page 10, of our Petition.

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